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No. 95-214

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SYLVIA DeANGELIS,

Petitioner,

v.

EL PASO MUNICIPAL
POLICE OFFICERS ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE SUPREME COURT:

The Respondent, the El Paso Municipal Police Officers Association, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Sylvia DeAngelis.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by the Petitioner, the Association submits the following additional authority:

U.S. Const. amend. I.

STATEMENT OF THE CASE

Sylvia DeAngelis [DeAngelis] was a Sergeant with the El Paso Municipal Police Department and a member of the El Paso Municipal Police Officers Association [Association] at the time this action arose. She complained about various anonymous derogatory articles that appeared in the Association's publication which discussed women in the police force. The Association invited DeAngelis to respond to the articles, but she never did. Instead, she initiated a complaint under Title VII of the Civil Rights Act of 1964, as amended, claiming sexual harassment and retaliation. 42 U.S.C. §2000(e), *et seq.* A jury awarded actual and punitive damages against the Association.[1]

The Fifth Circuit reversed and rendered a take nothing judgment against DeAngelis. The Court found that the comments contained in the articles did not rise to the level of discriminatory conduct under Title VII and that DeAngelis had made a factually insufficient showing of any retaliation or hostile work environment. The Court further decided under existing precedent that the four

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[1]The undersigned counsel did not try the case. The case arose prior to the 1991 amendments to the provisions of Title VII and should not have been tried to a jury. Under the pre-1991 amendments, compensatory and punitive damages were not available. *Landgraf v. USI Film Prod.*, ___ U.S. ___, 114 S.Ct. 1483, 1508 (1994). This point was never raised by trial counsel.

"printed derogatory references to Sergeant DeAngelis at irregular intervals in two and a half years do not demonstrate sufficient hostility toward her as a matter of law." *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 370-71 (1993). Parenthetically, the Court found that, given the expressive nature of the objectionable speech, the strict application of Title VII to DeAngelis' claims would be a regulation of speech because of its expressive content. The First Amendment normally prohibits such regulation. *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. 2538, 2546-47 (1992); U.S. Const. amend. I. The speech was anonymous speech on a variety of matters of public concern and also the author's opinion of women in the police force. (Appendix to DeAngelis' Petition For Writ of Certiorari pages 1-27). It presumptively enjoys First Amendment protection, and as the Fifth Circuit decided, it does not rise to the level of objectionable speech but was "clumsy, earthy humor." (Appendix to DeAngelis' Petition For Writ of Certiorari page 17). The Court appropriately did not reach the constitutional issue because sufficient independent grounds for reversal existed. If the Petition For Writ of Certiorari is granted and the Court's factual sufficiency determination is reversed, then the constitutional issue provides an independent basis to uphold the judgment. *McIntyre v. Ohio Elections Commission*, ___ U.S. ___, 115 S.Ct. 1511, 1524 (1995); *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. at 2546-47.

SUMMARY OF THE ARGUMENT

This case does not present an issue of public importance to warrant review by this Court. The Petitioner, DeAngelis, has not shown any compelling reason for this Court to grant her Petition for Writ of Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE JURY VERDICT AND FACTUAL FINDINGS OF THE DISTRICT COURT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE, AND PETITIONER HAS NOT MET THE TEST FOR REVIEW BY THIS COURT.

This Court reserves review by writ of certiorari for those special cases meeting the traditional standards of appellate discretionary review. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955). DeAngelis has failed to show how the Fifth Circuit ruling is inconsistent with that of any other Circuit or this Court, or how it has misapplied existing law. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 456 (1951).

Additionally, DeAngelis has failed to show how this case is significant to the jurisprudence of the United States or how it is an "atrocious departure" from accepted standards of judicial review.[2] The Court engaged in a careful analysis of the entire record and decided that there was a factual insufficiency to support the jury verdict or the findings of the District Court. *Boeing*

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[2] Respondent takes exception to the vituperative attack upon the Fifth Circuit opinion contained in Petitioner's Petition For Writ of Certiorari.

Company v. Shipman, 411 F.2d 365, 374-5 (5th Cir. 1969).

The Court applied the proper standard of review of a jury verdict and, through implication, applied the standards set forth in *Pullman* to review the Court's findings. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). If a reasonable jury could not have returned a verdict for DeAngelis on the facts presented, it logically follows that the trial court's findings based upon the same evidence and the verdict are also not supported by sufficient evidence and are clearly erroneous under the *Pullman* analysis. *Id.* The declaratory judgment findings of fact were ancillary equitable relief dependent upon the jury verdict. (Appendix to DeAngelis' Petition For Writ of Certiorari page 31). A finding of fact may be set aside as clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The Court's finding of insufficient evidence for the jury verdict necessarily invalidates the trial court's declaratory judgment.

While the result here is of substantial interest to DeAngelis, that alone is not material to the determination of this Court's discretionary jurisdiction. Absent some principle, the settlement of which will be of importance to the public as opposed to the parties, certiorari should be denied. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. at 502.

II.

THE FIFTH CIRCUIT DID NOT MISSTATE THE RECORD IN ANY MATERIAL FASHION TO WARRANT THIS COURT'S EXERCISE OF DISCRETIONARY REVIEW.

DeAngelis has failed to provide any authorities to support this ground for review by writ of certiorari. There is no material misstatement of the record to warrant review by this Court. The only misstatements suggested by DeAngelis consist of the Court's summarization of the February 1990 article. (Petition for Writ of Certiorari page 13). The Court excerpted the pithier portions of the entire text appearing in the record regarding that particular article. As the Court stated, "We will summarize each column that was offered at trial as critical of Sergeant DeAngelis or women police officers in general." (Appendix to DeAngelis' Petition for Writ of Certiorari page 11). Therefore, DeAngelis has misconstrued the Court's selective quotation from those columns and erroneously concluded that the Court misstated the record.

Whether each column bore the disclaimer alluded to by DeAngelis is irrelevant. The Court did not place any weight in the existence of a disclaimer in its opinion. DeAngelis has not shown how the absence of a disclaimer would significantly affect the outcome of the litigation. The Court's conclusion that the Association was not proved to have violated the provisions of Title VII dispenses with the need to address the disclaimer issue.

CONCLUSION

DeAngelis has failed to meet the threshold test for appellate review by this Court. The judgment of the Fifth Circuit is not at variance with any prior decision of this Court or of any other Circuit cited by DeAngelis. DeAngelis has failed to show how the Fifth Circuit has departed from accepted standards of judicial review. Further, DeAngelis has failed to demonstrate any misstatement of the record or how such misstatement could have affected the outcome of the litigation.

Accordingly, the Association suggests that this case does not warrant review by this Court and that certiorari should be denied without further proceedings.

Respectfully submitted,

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